Supreme Court, U.S.
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No. 97-1172

In The
**Supreme Court of the United States**
October Term, 1997

WINSLOW R. LIEVSAY,
*Petitioner,*

v.

WESTERN FINANCIAL SAVINGS BANK, F.S.B., a Federal Savings Bank, and UNITED STATES TRUSTEE,
*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

# REPLY BRIEF OF PETITIONER

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## PETITIONER REPLIES THAT THIS PETITION IS NOT MOOT

The petitioner respectfully suggests that the response of Western Financial Savings truly proves that this Petition for Writ of Certiorari is not moot.

The respondent has brought to this court's attention three important matters pending in lower courts on collateral issues: (1) a pending motion to dismiss or convert this Chapter 11 at the bankruptcy court level[1], and; (2) an appeal by petitioner seeking the Bankruptcy Appellant Panel for the Ninth Circuit to disgorge to the bankruptcy estate excessive post petition adequate protection payments made to respondent[2], and; (3) that petitioner is attempting to reorganize 'sizable' debts in this matter[3]. All three matters will swing on the Supreme Court's decision regarding the 11 U.S.C. §1123(b)(5) issue.[4] Thusly, should the

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[1] On February 10, 1998 the Bankruptcy court on motion by the U. S. Trustee in light of Debtor's good faith appeal to the U. S. Supreme court, continued the status conference until March 21, 1998 at 3:00 p.m. The court suggested however that Debtor should consider filing a revised plan of reorganization covering two possible eventualities. One plan each for the possible outcomes of the *sub judice* appeal to the Supreme Court.

[2] This is BAP case CC-97-1279 which was heard and submitted January 21, 1998. On January 15, 1998 petitioner moved the BAP for judicial notice of the *sub judice* petition to the Supreme Court.

[3] This debtor's schedules reflected $107,000 in unsecured debt in addition to the undersecured $312,000 claim held by respondent.

[4] A definitive ruling on this 'interlocutory' bankruptcy issue will truly advance the course of this

Supreme Court rule in favor of the petitioner, a very meaningful partial remedy to the respondent's foreclosure will be effectuated.[5]

The respondent cites *Church of Scientology of Cal. V. United States*, 506 U.S. 9 (1992) as a standard of mootness. Petitioner heartily concurs with this authority's standard. Applying the main principal of the *Church of Scientology* shows our issue not to be moot:

> "While a court may be not be able to return the parties to the *status quo ante* ... a court can fashion some form of meaningful relief in circumstances such as these... a court does have power to effectuate a partial remedy .. [and] .. [t]he

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reorganization. This case is a perfect example of the wisdom and efficiency of 28 U.S.C. § 1292(b) and why it should have been applied by the Circuit in our case as the BAP had done.

[5] The respondent's key argument before the BAP in petitioner's disgorgement action will be crippled if the Supreme Court rules that 11 U.S.C. 1123(b)(5) does not protect its claim from modification. Respondent has argued that 11 U.S.C. §1123(b)(5) prohibits the disgorgement of the mortgage payments in light of the Supreme Court's ruling in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). Without such protection in the Chapter 11 context, *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, Ltd., 484 U.S. 365 (1988) will apply and disgorgement will be mandated from this undersecured respondent. This disgorgement will return $41,000 to the bankruptcy estate to defray office relocation expenses be equitably distributed to the petitioner's unsecured creditors under an approved plan of reorganization. Such a ruling will allow as well a further action against respondent by the bankruptcy estate to recover $30,000 in serendipitous equity appreciation that rightfully belonged to the bankruptcy estate.

availability of this possible remedy is sufficient to prevent this case from being moot."[6]

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## CONCLUSION

Thus it is clear that the Supreme Court's decision in this matter can effectuate meaningful relief towards returning the bankruptcy estate to the *status quo ante*. The principles of *Church of Scientology of Cal. V. United States* suggest that our issue is not moot.

Respectfully submitted,

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[6] *Church of Scientology of Cal. V. United States*, 506 U.S. (1992) at 12-13